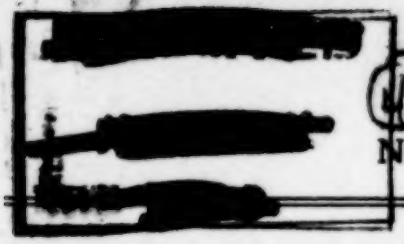

DEC 19 2001

No. 01-298

Supreme Court, U.S.
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In The

Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Does a state waive its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court and then seeks a dispositive ruling?

LIST OF PARTIES BELOW

In addition to the parties reflected in the caption, also defendants in the proceedings below were Edwin A. Rugg (personally and in his capacity as Vice-President of Academic Affairs, Kennesaw State University (KSU)), Timothy Mescon (individually and in his capacity as Dean of the Coles College of Business at KSU), and Teresa J. Covin (personally and in her capacity as Chair of the Department of Management & Entrepreneurship at KSU). Mr. Mescon was later dismissed without prejudice from the suit.

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit, *Lapides v. Board of Regents of the University System of Georgia*, No. 00-14984 (11th Cir. May 24, 2001), is reported at 251 F.3d 1372, and is reprinted at Pet. App. 1a. The U.S. District Court's Order of September 8, 2000, is unreported but is reprinted at Pet. App. 12a.

STATEMENT OF JURISDICTION

Petitioner has been granted review from the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of May 24, 2001. This Court granted the Petition for Writ of Certiorari on October 29, 2001. The Supreme Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI.

Respondents jointly removed a complaint filed in state court to federal court, under the authority of 28 U.S.C. §§ 1441,

1443 & 1446, reprinted in pertinent part at Pet. App. 29a-33a.

STATEMENT

1. Petitioner, Paul D. Lapides, is tenured as an Assistant Professor of Management and Entrepreneurship and Director of the Corporate Governance Center at the Michael J. Coles College of Business at Kennesaw State University (KSU), in Kennesaw, Georgia. KSU is a unit of the State University System of Georgia under its Board of Regents ("Regents"). Aggrieved because of various personnel actions taken against him by KSU administrators, J.A. 12-17, Lapides brought suit in Superior Court of Cobb County, State of Georgia, on March 9, 2000, naming as defendants the Regents and three KSU administrators in both their personal and official capacities. See, *supra*, at (ii).

Lapides' state court complaint sounded in Georgia's common law torts of defamation, intentional infliction of emotional distress, invasion of privacy, and false light disclosures. J.A. 12-14 (¶¶ 9-15); 16 (¶ 19); 17 (¶ 24). Lapides also included an allegation that defendants had violated his constitutional due process rights. J.A. 12 (¶ 8) (defendants' conduct "resulted in numerous violations of [Lapides'] due process rights . . . ."). The gravamen of the complaint was that KSU administrators had placed false and defamatory material into Lapides' personnel files, and had disseminated such statements extensively, which had resulted in substantial reputational injury for Lapides. In his state court complaint, Lapides also gave notice that his grievance before the U.S. Equal Employment Opportunity Commission (EEOC) was pending on charges that KSU had discriminated against him on the basis of religion and gender, and that KSU had retaliated

against him. Lapides indicated that at such time as the EEOC had given the proper authorization, he would amend his complaint to add those claims. J.A. 18 (¶ 27).

In his state court complaint, Lapides requested both compensatory and punitive damages, as well as costs and attorneys' fees. J.A. 17-18. Lapides also sought declaratory relief through judicial findings that defamatory material had been placed in his personnel files and had been inappropriately disclosed. J.A. 17 (¶ 26).

2. On April 13, 2000, attorneys for the State of Georgia filed two answers in Cobb County Superior Court, one on behalf of the Regents, J.A. 20, and the other for the individual defendants. J.A. 35. Both answers asserted a panoply of affirmative defenses, including failure to comply with various provisions of the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 *et seq.*, J.A. 23-24, sovereign immunity, J.A. 25; 37, qualified immunity, J.A. 37, and Georgia's Eleventh Amendment immunity. J.A. 25; 37.

On the same day, Georgia's lawyers filed a Notice of Removal in the U.S. District Court for the Northern District of Georgia. J.A. 3; Pet. App. 34a. The notice asserted a right of removal under 28 U.S.C. §§ 1441 & 1446, insofar as Lapides' complaint ostensibly sought recovery under 42 U.S.C. § 1983 and Title VII of the Civil Rights Act, id. § 2000(e) *et seq.* Georgia did reserve any defenses available to it under state and federal law. See J.A. 4, 8; Pet. App. 35a. Georgia also filed the statutorily-required notice in Cobb County Superior Court, staying further proceedings in state court. J.A. 7. This notice indicated that "All Defendants consent to the Removal of this action." J.A. 8.

With its Removal Notice filed, Georgia then sought, on the very same day, to dismiss Lapides' complaint in federal court

under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). See J.A. 48; Pet. App. 37a. The State of Georgia argued that a 12(b)(6) dismissal – a disposition with prejudice – was required on the grounds that Lapides failed to state a claim upon which relief could be granted, or that the defendants variously have "Eleventh Amendment immunity," "qualified immunity," or "are protected by sovereign immunity." J.A. 49; Pet. App. 38a. Additionally, Georgia requested a 12(b)(1) dismissal for lack of jurisdiction over the Title VII claims which, Georgia argued, were not ripe for lack of a "right to sue" letter from the EEOC. In any event, Georgia made clear that it sought the dismissal of the entirety of Lapides' complaint. See J.A. 49; Georgia's Brief in Support of Motion to Dismiss, at 20 ("Defendants respectfully submit that Plaintiff's Complaint is subject to dismissal and request that it be dismissed in its entirety . . . .").

3. Lapides resisted the removal of the case to federal court and sought remand. J.A. 51. After extensive briefing, in which the attorneys for the State of Georgia made certain representations as to their intentions for the litigation, the District Court denied the motion to remand. See Pet. App. 15a-17a. The District Court rejected Lapides' contention that Georgia's filing of an answer in state court somehow precluded removal. Additionally, the fact that Georgia raised its Eleventh Amendment defense in state court, J.A. 25; 37, was strongly indicative, the District Court ruled, that Georgia intended to invoke federal court jurisdiction. See Pet. App. 16a-17a. Finally, relying on this Court's ruling in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998), the District Court held that "federal courts have jurisdiction to hear a removable case, even though some of the claims in the case may be barred by the Eleventh Amendment." Pet. App. 17a.

The District Court then denied Georgia's Motion to Dismiss on Eleventh Amendment grounds, holding that Georgia

had waived its immunity by removing the case to federal court and then seeking a dispositive ruling on the merits. See Pet. App. 19a-24a. Drawing from this Court's decisions in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), and *Schacht*, the District Court concluded that Georgia's litigation conduct amounted to an "unequivocal" waiver of Eleventh Amendment immunity. Pet. App. 20a-21a. The District Court found that various forms of litigation conduct by state officials – including removal of cases to federal court – constituted a valid waiver, irrespective of the authority of those officials under state constitutions or statutes to waive the Eleventh Amendment bar. See Pet. App. 21a; 23a-24a. The District Court also relied upon this Court's precedents that a state's voluntary intervention in a federal case to assert its own claim amounted to a waiver of the Eleventh Amendment. See Pet. App. 21a (citing *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883); *Missouri v. Fiske*, 290 U.S. 18, 24-25 (1933); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 (1959)).

Although the District Court denied Georgia's Motion to Dismiss on Eleventh Amendment grounds, it did grant dismissal on Lapides' section 1983 claims against the two named defendants in their personal capacities. Pet. App. 25a-27a. The District Court specifically ruled, however, that Lapides' official capacity claims against defendants Rugg and Covin would survive dismissal. Pet. App. 27a-28a. The remainder of Georgia's grounds for dismissal, including its suggestion that Lapides' Title VII claim was barred, were rejected.[1] See Pet.

[1] In a motion filed after the District Court's ruling on Georgia's Eleventh Amendment immunity, the named defendants sought dismissal of Lapides' state law claims against Rugg and Covin in their personal (continued...)

App. 18a-19a.[2]

4. Georgia took an interlocutory appeal from the District Court's ruling that it had waived its Eleventh Amendment immunity, and the Court of Appeals reversed. Pet. App. 1a. The Court of Appeals held that, under Georgia's Constitution, no authorization had been granted to the state's attorneys to waive Eleventh Amendment immunity. The panel regarded this as consistent with this Court's holding in *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 467 (1945). See Pet. App. 4a-6a.

Despite its conclusion, the Court of Appeals appeared perplexed by Georgia's litigation posture in this case. See Pet. App. 8a-9a ("[W]e are also troubled by the seemingly inconsistent positions of the State by both asserting that the federal courts have jurisdiction to obtain removal, while simultaneously arguing with equal force that the federal courts do not have authority to hear the claims because of Eleventh Amendment immunity . . . ."); App. 10a-11a & n. 4 ("[T]he State removed to theoretically take advantage of our superior knowledge of the federal questions involved in the case. . . .

[1](...continued)
capacities. The district court ruled that those claims would be dismissed because they were covered under the Georgia Tort Claims Act and that Lapides had failed to comply with the *ante-litem* notice requirement of the GTCA. O.C.G.A. § 50-21-26(b). This ruling, affirmed on appeal, has no bearing on the § 1983 claims against Rugg and Covin in their official capacities. Nor does it, under its terms, affect the state law claims against the Regents.

[2] Lapides subsequently secured a "right to sue" letter from the EEOC on his Title VII claims. In September 2001, he filed a separate action in federal court on these counts, which are not otherwise before this Court in this proceeding.

This is, in fact, what the State argues in its brief for this case. Therefore, we proceed based on their arguments and disregard the possibility that the assertion of sovereign immunity may in fact lead to a situation in which there are no claims over which the federal courts have jurisdiction.").

The Court of Appeals reversed and remanded to the District Court, which was "instructed to hear only those non-barred claims over which it has jurisdiction and remand the others to state court. If no such non-barred federal questions exist, the whole case is to be remanded to state court." Pet. App. 11a. The Court of Appeals did not, however, ascertain whether any of Lapides' claims would survive Georgia's assertion of Eleventh Amendment or other sovereign immunity defenses.

5. A timely Petition for Writ of Certiorari followed, which this Court granted on October 29, 2001.

SUMMARY OF THE ARGUMENT

Georgia relinquished its Eleventh Amendment immunity when it invoked federal court jurisdiction by removing this case. This conclusion follows from the unique nature of waivers of the Eleventh Amendment bar by a state's litigation conduct. Unlike situations where a state is alleged to have waived the Eleventh Amendment by its statutes of general application or by accepting the conditionalities of federal funding, forfeitures by way of litigation conduct are an express and particular manifestation of a state's consent to federal court jurisdiction. In such cases the proper standard for waiver is whether the state "voluntarily invoked" federal court jurisdiction or made "a 'clear declaration' that it intends to submit itself to the

[jurisdiction of the federal courts]." *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999) (citing *Gunter v. Atlantic Coast R. Co.*, 200 U.S. 273, 284 (1906), and quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)). Such a standard is consistent with this Court's articulated concerns as to the dignity interest vindicated by the Eleventh Amendment, and also the unique and hybrid nature of Eleventh Amendment immunity as waiveable by states. See id. at 675.

A formidable line of this Court's decisions confirm that states forfeit their Eleventh Amendment immunity when they invoke federal jurisdiction. This rule originated in *Clark v. Barnard*, 108 U.S. 436 (1883), holding as an elemental proposition that the Eleventh Amendment "is a personal privilege which [a state] may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction." Id. at 447. This rule was endorsed in *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906) ("[W]here a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment."), and in *Missouri v. Fiske*, 290 U.S. 18, 25 (1933). These rulings have been confirmed in the Court's recent Eleventh Amendment jurisprudence. See *College Sav. Bank*, 527 U.S. at 675-76 (a federal court "will find a waiver . . . if the State voluntarily invokes [its] jurisdiction.") (citing *Gunter*, 200 U.S. at 284), 681 n.3; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997). That the Eleventh Amendment bar may be lifted by a state's invocation of federal jurisdiction is consistent also with the textual thrust of the Amendment which prohibits "suit[s] . . *commenced or prosecuted* against a State" in federal court. U.S. CONST. Amend. XI (emphasis added).

Removal is an exceptional form of litigation conduct that invokes federal court jurisdiction. Provisions of the removal statute ensure that a state's removal of an action will be voluntary and knowing. Removal *always* requires a state defendant's consent, even when it stands amongst a number of defendants. See 28 U.S.C. § 1446(a). The removal statute serves clear notice to states that removal has significant legal consequences, and is not to be entered into lightly. See id. (cross-referencing FRCP 11). When a state removes a case to federal court, it thus constitutes a waiver of the forum immunity the state would otherwise have to the adjudication of the causes of action contained in the plaintiff's complaint. However, the state retains in federal court all other immunities it would otherwise legitimately possess. If a state is not prepared to unconditionally and fully submit to federal jurisdiction, it should not be allowed to remove a case and later withdraw its consent.

That a state lifts the Eleventh Amendment bar when it removes a case is not necessarily inconsistent with the requirement of *Ford Motor Co. v. Department of Treas. of Indiana*, 323 U.S. 459 (1945), that the official waiving the state's Eleventh Amendment immunity be properly authorized to do so under state law. *Ford Motor* can be critically distinguished on a number of grounds, not the least of which is that the decision does not deal with situations where the state actually invokes the jurisdiction of the federal courts. See id. at 466-67. In such situations, this Court has suggested that the proper analysis is whether the particular state official had the authority to invoke federal jurisdiction. See *Gunter*, 200 U.S. at 285-86; *Gardner v. New Jersey*, 329 U.S. 565, 575 (1947). *Ford Motor* may be also an unreliable guidepost in the domain of this Court's new Eleventh Amendment jurisprudence,

especially with the demise of constructive waivers. Lastly, the rule of *Ford Motor* — if it is to be applied at all — must necessarily be tempered by such federal law considerations of judicial estoppel and other equitable concerns where a state purports to assert federal jurisdiction and then later disavows that choice.

ARGUMENT

STATES WAIVE THEIR ELEVENTH AMENDMENT IMMUNITY WHEN THEY REMOVE CASES TO FEDERAL COURT

A. Forfeitures of Eleventh Amendment Immunity By a State's Litigation Conduct Are Distinct From Other Types of Waivers

1. The type of waiver raised in this case is one resulting from the litigation behavior of states in invoking the jurisdiction of the federal courts, foregoing the immunity conferred by the Eleventh Amendment. Such a forfeiture of the forum immunity that states otherwise enjoy in federal proceedings is quite distinct from other types of waivers that states may make in expressing their consent to federal court jurisdiction. Where, as here, a state actually invokes federal jurisdiction by removing a case from state court to federal court, that is as clear and manifest an expression of the state's willingness to submit itself to the judgment of the federal courts as might be imagined.

The kind of waiver implicated here is thus not one contained in a state statute of general application. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985);

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam). Nor does this case arise from the conditionalities of Congressional funding for federal programs and activities. See *South Dakota v. Dole*, 483 U.S. 203 (1987). Neither is it suggested here that a state's course of dealing in a Congressionally-regulated marketplace constitutes an implied waiver of the state's Eleventh Amendment immunity, as in the now-discredited doctrine of *Parden v. Terminal Railway of the Alabama State Docks Dep't*, 377 U.S. 184, 191-92 (1964). See *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999).

Rather, when a state engages in specific litigation tactics in relation to a particular case or controversy, there are correspondingly high indicia of the state's intention to waive Eleventh Amendment immunity and to submit that dispute to a federal court's determination. One need not speculate as to the effect of a state statute of general application to a (probably) uncontemplated, future litigation. Nor need a court concern itself with a troublesome Hobson's choice when a state is confronted with the dilemma of accepting federal funds in exchange for prospective waivers of Eleventh Amendment immunity. A state's own litigation conduct — the product of voluntary choices as how to best achieve its litigation objectives — instead presents the clearest possible picture of the state consent needed to lift the Eleventh Amendment bar on federal court adjudication of disputes between private parties and states. See *College Sav. Bank*, 527 U.S. at 680 (federal courts need to be certain that "the State in fact consents to suit.").

In this sense, waivers by litigation conduct are also distinct from the generalized situation of constructive waiver mentioned in *Parden*, and now thoroughly repudiated by this Court in *College Savings Bank*. Such constructive waivers

ostensibly arose when a state performs some act that, based on the surrounding circumstances, would lead a court to believe that it has waived its immunity. See id. at 681-82 (discussing *Parden*, 377 U.S. at 192-96). When a state engages in the pursuit of its litigation objectives in a case, and particularly when such choices involve the actual invocation of federal court jurisdiction, there is nothing "constructive" about the waiver or forfeiture of the state's constitutionally protected privilege of forum immunity in federal tribunals. It is, instead, as express a sort of immunity waiver as can be envisaged.

2. Petitioner is mindful of the heightened standard of intent for state waivers of Eleventh Amendment immunity. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985) ("a State will be deemed to have waived its immunity 'only where stated "by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." '" Id. (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909))). *Atascadero* also cautions that "we require an unequivocal indication that the State intends to consent to federal [court] jurisdiction that otherwise would be barred by the Eleventh Amendment." Id. at 238 n.1.

Nonetheless, the standard articulated in *Edelman* and *Atascadero* arose in relation to state constitutional provisions or statutory enactments, and not the situation of particularized litigation conduct in relation to a specific case. The *Edelman-Atascadero* benchmark for forfeitures of Eleventh Amendment immunity may not necessarily be appropriate in situations of waiver by litigation conduct, but even if such a heightened standard is employed, a state's removal of an action to federal court clearly constitutes an "express," "unequivocal," and "overwhelming" intent to forego Eleventh Amendment

immunity. Indeed, in *Edelman*, the Court refers to a heightened standard for waiver in relation to the principle that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights . . . ." 415 U.S. at 673. Waivers by litigation behavior, especially a state's affirmative invocation of federal court jurisdiction, are evidence of "express" and not merely "constructive" consent.

This Court has more recently observed in *College Savings Bank* that a state may waive its Eleventh Amendment immunity by either "voluntarily invok[ing]" federal court jurisdiction *or* making "'a clear declaration' that it intends to submit itself to the [jurisdiction of the federal courts]." 527 U.S. at 675-76 (citing *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906), and quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)). This may be a more authoritative statement of law in regard to waivers by litigation conduct. The Court's emphasis in *College Savings Bank* on Eleventh Amendment immunity as being a "personal privilege which [a state] may waive at pleasure," id. at 675 (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)), confirms this view. Some forms of litigation tactics — particularly (as in this instance) a state removing a case from state court to federal court — would certainly qualify as either "voluntarily invok[ing]" federal court jurisdiction or a "clear declaration that a state intends to submit itself" to federal court jurisdiction.

3. Waivers by a state's litigation behavior are also consonant with this Court's observation that "[t]he principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944). This Court's concern in *Read* with "mitigat[ing]" the "rigors" of

Eleventh Amendment immunity was no mere rhetorical flourish. Rather, the consideration in *Read* was that states occasionally will choose to waive their immunity, and one of the ways they will manifest that choice is by pursuing a litigation strategy that takes them into federal court in the capacity of plaintiff, claimant, intervenor, or defendant. In such circumstances, as this Court intimated in *Read*, it would be proper to balance the Eleventh Amendment's significant federalism concerns in liberating state governments from potential federal court interference with the countervailing interest of states being able to contest cases with individuals in federal court on the basis of mutual equality and respect. See also *Poindexter v. Greenhow*, 114 U.S. 270, 286 (1885) ("This immunity from suit secured to the states, is undoubtedly a part of the constitution of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument.").

Additionally, a rule which has states waiving their Eleventh Amendment immunity by voluntarily submitting to federal court jurisdiction is fully consistent with the dignity interest that is supposed to be vindicated by the Eleventh Amendment. See *In re Ayers*, 123 U.S. 443, 505 (1887); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Hess v. Port Authority Trans-Hudson*, 513 U.S. 30, 39-40, 52 (1994); but see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821) ("We must ascribe the amendment, then, to some other cause than the dignity of a State.") (Marshall, C.J.). Obviously, when a state itself affirmatively invokes federal court jurisdiction (through removal) it cannot be said to have been subjected to the coercive process of federal courts at the instance of private parties. State dignity would, consequently, not be impaired by this Court's recognition of certain waivers of Eleventh Amendment immunity by virtue of a state's purposeful litigation

behavior.

4. Lastly, waivers by litigation conduct need not necessarily contradict this Court's holdings that Eleventh Amendment immunity may be asserted by a state at any point in a case. See *Ford Motor Co. v. Dep't of Treas. of Ind.*, 323 U.S. 459, 467 (1945) (holding that Eleventh Amendment immunity may be asserted for the first time on appeal); *Edelman*, 415 U.S. at 678; *Fla. Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982); *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998); cf. *Schacht*, 524 U.S. at 389, 393-94 (Kennedy, J., concurring). By the same token, this Court has held that the Eleventh Amendment bar does not need to be considered by a court sua sponte as a subject-matter limitation on the jurisdiction of federal courts. See *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 515 n.19 (1982); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997); *Schacht*, 424 U.S. at 389 ("Nor need a court raise the [Eleventh Amendment] defect on its own. Unless the State raises the matter, a court can ignore it.") (Breyer, J., for the Court) (citing *Patsy*). The hybrid nature of the forum immunity conferred by the Eleventh Amendment is problematic and has certainly been recognized in this Court's jurisprudence. See *Schacht*, 524 U.S. at 394 (Kennedy, J., concurring).

There is a clear tension between a characterization of Eleventh Amendment immunity that can be both waived by a state and raised at any time in the state's discretion. But for purposes of the present case, the Court need not reach some definitive conclusion in resolving this ostensible paradox. It suffices for this Court to rule that certain litigation behavior will act as such a clear indication of a state's invocation of federal jurisdiction, or of a voluntary submission to federal judicial power, that such conduct will serve as an automatic forfeiture of the state's forum immunity conferred by the Eleventh

Amendment. In such circumstances, a state should properly be found to have itself lifted the Eleventh Amendment bar.

B. This Court's Decisions, as Well as the Constitution's Text, Indicate That a State's Invocation of Federal Court Jurisdiction is a Waiver of Eleventh Amendment Immunity

1. A long line of this Court's authority indicates that where a state affirmatively and voluntarily invokes federal court jurisdiction, the state foregoes its Eleventh Amendment immunity. This sturdy thread of cases has run throughout the changing tapestry of this Court's Eleventh Amendment and federalism jurisprudence. It remains a reliable guide for this Court in the resolution of the specific issue raised here: whether a state foregoes its Eleventh Amendment immunity when it removes a matter from state court to federal court.

a. The locus classicus of this rule of waiver through state litigation conduct is a sequence of three cases, beginning with *Clark v. Barnard*, 108 U.S. 436 (1883). This case arose when Barnard, representing the assignees-in-bankruptcy of a failed railroad, sought to block the State of Rhode Island, acting through its general treasurer, Clark, from disposing of some of the railroad's debentures. Barnard brought suit in the U.S. Circuit Court for the District of Massachusetts. Clark answered the bill in equity with a demurrer, challenging the jurisdiction of the federal court based on the Eleventh Amendment bar. See id. at 445. The demurrer was denied, and Rhode Island subsequently made a claim to funds in the custody of the court, and then answered the bill by raising both substantive defenses and Eleventh Amendment immunity. See id.

The first question considered by this Court in *Clark* was whether the suit was blocked by the Eleventh Amendment. Justice Matthews, writing for the Court, noted that "[w]e are relieved, however, from its [the Eleventh Amendment's] consideration by the voluntary appearance of the State in intervening as a claimant of the fund in court." Id. at 447. The Court went on to hold, as an elemental proposition, that the Eleventh Amendment

> is a personal privilege which [a state] may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction. . . . Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the state and the appellees to the fund, to which both claimed title.

Id. at 447-48.

So in *Clark*, Rhode Island's appearance to make a claim in the proceeding, even with a demurrer premised on a jurisdictional bar, constituted a waiver of Eleventh Amendment immunity. See id. at 448. The Court observed that the state's invocation of a federal forum – in this instance to compete for part of a bankruptcy fund – distinguished it from earlier cases, such as *Georgia v. Jesup*, 106 U.S. 458, 462 (1882), "where the State expressly declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court." *Clark*, 108 U.S. at 448. Having found that Rhode

Island had waived its Eleventh Amendment immunity, the Court proceeded on the merits to give a judgment to the state. See id. at 461.

The rule in *Clark* was endorsed in *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273 (1906). While this case essentially involved injunctive relief against a state, one issue considered by the Court in *Gunter* was the effect of an earlier litigation, *Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244 (1872), and whether South Carolina had voluntarily submitted in that case to the jurisdiction of the federal courts. The Court concluded in *Gunter* that South Carolina had, through its designated officers, invoked federal court jurisdiction and that it was bound by the earlier ruling. The Court also held that "where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Gunter*, 200 U.S. at 284 (citing *Clark*, 108 U.S. at 447). And, in a ruling that will be significant for Petitioner's subsequent discussion of the authority of state officers to invoke federal court jurisdiction by removing actions, see *infra* at 38, this Court intimated that South Carolina could not seek to disclaim the authority of its Attorney General to have participated in the earlier *Pegues* proceedings. See id. at 289.

The final case in this initial triptych is *Missouri v. Fiske*, 290 U.S. 18 (1933). This controversy arose when Missouri intervened in a federal court case, not on the merits, but merely to prevent the distribution of certain assets of an estate prior to the completion of a Missouri probate proceeding in which the state was contending that the assets needed to be included in the decedent's estate. After the state intervened, private parties in the federal court suit sought an injunction against Missouri to prevent it from pursuing its claim against the assets in the

probate court. See id. at 21. This Court articulated the applicable law in these terms:

> The first question is whether the State has waived the immunity it now claims. Immunity from suit under the Eleventh Amendment is a personal privilege which may be waived. *Clark v. Barnard*, 108 U.S. 436, 447, 448; *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284. It may be waived by a voluntary proceeding in intervention (*Clark v. Barnard*, supra) and the question is as to the effect of the State's application to intervene in this suit.

Id. at 24.

This Court went on to rule, however, that Missouri's intervention as a party defendant in the federal proceeding was, based on the specific relief sought by the state, too limited to qualify as a waiver of the Eleventh Amendment bar. See id. at 25. "As only a 'temporary impounding' was sought, which was 'in no sense a matter of right, but rather partakes of grace,' the court concluded that the intervention was too limited in character to constitute a waiver of the immunity given by the Amendment, if that immunity would otherwise exist." See id. The Court nonetheless was emphatic about the legal consequences of a state invoking federal court jurisdiction:

> If the State chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the State may be permitted to do so, and in that event its rights will receive the same consideration as those of other parties in interest. But when the State does not come in and withholds its consent, the court has no authority to issue process against the State to compel it to subject itself to the court's judgment, whatever the nature of the suit.

Id. at 28 (citations omitted). And while the *Fiske* Court emphasized the role of a state as a plaintiff or intervenor – which, of course, would have been the context for Missouri's action in the federal proceeding contesting the probate court's actions – its logic equally is applicable to cases where a state removes an action from state court to federal court.

b. The trilogy of *Clark*, *Gunter* and *Fiske* cover many scenarios in which state litigation conduct was deemed to be a waiver of Eleventh Amendment immunity. But whether the state was a claimant contesting a share of an estate, or as an intervenor to determine its taxing authority, or as a plaintiff actually seeking affirmative relief against a private party, this Court ascertained a broader principle: that when a state itself seeks federal court jurisdiction, it cannot later raise an Eleventh Amendment bar to that adjudication.

This Court has reaffirmed the rule that certain kinds of litigation conduct engaged in by state attorneys will be deemed a waiver. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), a state's filing a proof of claim in bankruptcy was held to forfeit the state's Eleventh Amendment immunity. The Court in *Gardner* specifically explained:

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*. It is none the less such because the claim is rejected *in toto*,

> reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash. When the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim. See *Clark v. Barnard*, 108 U.S. 436, 447-448; *Gunter v. Atlantic Coast Line*, 200 U.S. 273, 284-289; *Missouri v. Fiske*, 290 U.S. 18, 24-25.

Id. at 573-74 (other citations omitted); see also *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933).

Lest Georgia suggest that the rule of *Clark* and its progeny is merely an obscure aspect of federal bankruptcy jurisdiction (notwithstanding the non-bankruptcy contexts of *Gunter* and *Fiske*), without any wider Eleventh Amendment relevance, it would do well to observe the broader applications of the principle. In *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), the Court approvingly cited *Clark* and *Fiske*, and held that "a State may waive [Eleventh Amendment immunity] at its pleasure . . . as by a general appearance in litigation in a federal court . . . ." Id. at 276. These cases thus stand for a more far-reaching proposition than their bankruptcy or intervention contexts would otherwise suggest. See also *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 473 (1987) ("If a State waives its immunity and consents to suit in federal court, the suit is not barred by the Eleventh Amendment.") (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883)).

c. Lastly, and most importantly for our present purposes, *Clark* and its progeny have not only survived intact the application of this Court's recent Eleventh Amendment jurisprudence, but have been singled out for approbation and continued vitality. Indeed, this Court as recently as two years

ago sweepingly endorsed the notion that states can waive their Eleventh Amendment immunity by engaging in certain litigation behavior:

> *Gardner v. New Jersey* . . . held that a bankruptcy court can entertain a trustee's objections to a claim filed by a State, [and] stands for the *unremarkable* proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts.

College Sav. Bank, 527 U.S. at 681 n.3 (citation omitted) (emphasis added). Moreover, this Court noted in the same case that a federal court "will find a waiver . . . if the State voluntarily invokes [its] jurisdiction." Id. at 675-76 (citing *Gunter*, 200 U.S. 273, 284 (1906)).

These sentiments were certainly echoed by both the majority and the concurrence in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998). The Court noted that "[a] State can waive the [Eleventh Amendment] defense." Id. at 389 (citing *Clark*, 108 U.S. at 447). Justice Kennedy observed in his concurrence that

> [i]n permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. . . . Even if appearing in federal court and defending on the merits is not sufficient to constitute a waiver, a different case may be presented when a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction. . . . Since a State which is made a defendant to a state-court action is under no compulsion to appear in federal court and, like any other defendant, has the unilateral right to block removal of the case, any appearance the State makes in federal court may well be regarded as voluntary in the same manner as the appearances which gave rise to the waivers in *Clark* and *Gardner*.

524 U.S. at 394-96 (Kennedy, J., concurring) (discussing *Gardner* and *Clark*). See also *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) ("a State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it").

2. This line of decisions conclusively establishes the point that when states invoke federal court jurisdiction, they forfeit any forum immunity they would otherwise possess under the Eleventh Amendment. But this proposition also has some support in the textual thrust of the Eleventh Amendment itself, which is concerned with "suit[s] . . . *commenced or prosecuted* against" a State. U.S. CONST. Amend. XI (emphasis added).

Petitioner is, of course, mindful that this Court's Eleventh Amendment jurisprudence has, to a considerable degree, been concerned with identifying the Adopters' expectations as to state sovereign immunity, and has thus been less preoccupied with textual considerations for the Amendment. See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989). This Court has manifestly regarded it as proper to include within the ambit of the Amendment's interpretation classes of cases that are textually omitted. See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 10-17 (1890) (Eleventh Amendment barred a suit by a citizen against her own state in federal court); *In re New York (Petition of Walsh)*, 256 U.S. 490, 497-98 (1921) (Amendment applies to actions in admiralty, despite the text mentioning only "suit[s] in law or equity"). But such an interpretive methodology is not the same as reading words *out* of the text of the Eleventh Amendment.

In the original framing of the Amendment by the Third

Congress, the "commenced or prosecuted" language that found its way into the adopted text had some apparent significance. The apparent purpose of this provision clearly was to reverse the Supreme Court's ruling in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), as well as to go a step further and insulate states from any process brought at the instance of an individual in a federal court.[3] The apparent redundancy of "commenced or prosecuted" may thus have been an effort to cover possible forms of action in law or equity that might be initiated against a state, as well as the (perhaps) more remote contingency of quasi-criminal proceedings. In any event, however, the adopted text of the Amendment was narrower in scope than the proposal made by some Members of Congress and some state legislatures to categorically prevent states from "being made a party defendant" in federal court. PA. J. & WKLY. ADVERTISER, Feb. 27, 1793, at col. 2 (proposal of Rep. Sedgwick).[4]

[3] An alternative proposal that was made by Rep. Theodore Sedgwick of Massachusetts would have specifically indicated that "no state shall be liable to be made a party defendant in any of the judicial courts [of the United States] . . . ." PA. J. & WKLY. ADVERTISER, Feb. 27, 1793, at col. 2, quoted in William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1058-59 & n.116 (1983); see also Doyle Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 226 & n.73 (1968). All of the other proposed texts — including three others made in the Senate, 4 Annals of Cong. 25 (1794) (made on Jan. 2, 1794 by an undisclosed Senator, which ultimately was the final text of the adopted Amendment); id. at 30 (proposal by Sen. Gallatin); id. at 30 (proposal by an unknown Senator) — employed the "commenced or prosecuted" phrase, or just the word "prosecuted."

[4] See RESOLVES OF THE GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 28, 31-32 (1793) (resolution calling for an amendment (continued...)

It is thus certainly open to question whether the Amendment is even textually implicated when a state removes an action to federal court. Obviously, in such circumstances the suit was originally "commenced or prosecuted" against the state in *state* court. It was only by virtue of the state's removal that it found its way to federal court. In cases where a state has commenced proceedings originally in federal court, this Court has held that the Eleventh Amendment does not insulate the states from the consequences of their litigation decisions. In *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809), this Court, Chief Justice Marshall writing, noted

> It is contended [by the Commonwealth of Pennsylvania] that the federal courts were deprived of jurisdiction in this cause, by that amendment of the constitution which exempts States from being sued in those courts by individuals. . . . The right of a State to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by [the Eleventh] amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested.

Id. at 139. This principle consistently has been renewed in Eleventh Amendment cases. See *In re the Regents of the Univ. of Calif.*, 964 F.2d 1128, 1135 (Fed. Cir. 1992); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1148 (4th Cir. 1997) (the Eleventh Amendment "presents no bar to a state

[4](...continued)
that would clarify that a state "should [not] be held liable to answer on compulsory civil process"); 1793 Va. Acts ch. 52; 1 STATUTES AT LARGE OF VIRGINIA, 1792-1806, at 284 (1835) (states shall not "be made a defendant at the suit of any individual or individuals").

affirmatively entering a federal forum voluntarily to pursue its own interest."). See also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 405 (1821) (Supreme Court is empowered to review a question of federal law arising from a state court decision).

Whether this Court views a state's waiver of the Eleventh Amendment bar by its affirmative invocation of federal court jurisdiction through the lens of the Amendment's text, or through the optic of this Court's well-elaborated, consistent case law (beginning with *Clark* and culminating with *College Savings Bank*), the result is the same. Such an invocation is the most express form of waiver or forfeiture of Eleventh Amendment immunity. To hold that states cannot waive their forum immunity in federal court by voluntarily invoking that jurisdiction would do violence to the text of the Amendment and over a century of this Court's case law.

C. Removal Unambiguously Evinces a State's Voluntary Consent to Federal Court Jurisdiction

What remains to establish is whether removal is such a clear form of litigation conduct in invoking federal jurisdiction, so as to constitute a manifest forfeiture of the state's Eleventh Amendment immunity. Petitioner submits that it is, based on the particularly voluntary and consensual aspects of removal procedure, as well as other considerations that give the appropriate respect to the state's sovereign interests in pursuing litigation into federal court via removal.

1. While the federal statutory basis of removal is certainly not dispositive, some factors related to the status of that procedure may weigh on the Court's decision in this case. These statutory factors speak both to the voluntariness of a

state's removal action, as well as the degree of knowledge and care a state can be assumed to be exercising in making the removal.

a. The first, and most important, consideration is that removal always would require the voluntary consent of a defendant state, even when it stands amongst a panoply of private defendants. See 28 U.S.C. § 1446(a) ("a defendant *or defendants* desiring to remove any civil action . . . .") (emphasis added). This was confirmed by this Court in *Chicago, Rock I. & Pac. Ry. v. Martin*, 178 U.S. 245, 248 (1900), and *Gableman v. Peoria, D. & E. R. Co.*, 179 U.S. 335 (1900), and subsequently has never been the subject of any doubt. There can thus be no instance in which a case can be removed to federal court without the active consent and voluntary action of a defendant state.

In this regard, Georgia might contend that in *College Savings Bank*, this Court held that the voluntariness of waiver is destroyed when the state is forced to choose between refusing to waive immunity and the exclusion from a lawful activity. See 527 U.S. at 687. Therefore, it might be intimated that a waiver of immunity would be involuntary in a case in which the state is forced to choose between the forum of its choice and immunity. But this Court should be, as was the Eleventh Circuit, "reluctant to base any part of [a] holding on that ground, for it seems that both plaintiff and defendant are mutually excluded from the federal forum in that scenario and thus no strategic or other disadvantage is evident." Pet. App. 11a n.5.

To suggest that states are placed in a Hobson's choice by requiring them to waive their Eleventh Amendment immunity when they remove a case or otherwise affirmatively invoke federal court jurisdiction is without merit. "[C]alling upon a federal court's jurisdiction is fundamentally different, for

purposes of the Eleventh Amendment, from merely conducting commercial activity." *Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 26 (1st Cir. 2001). It is also evident that "the Eleventh Amendment . . . does not ensure a state the choice of a desirable alternative." Id. at 29. A state's invocation of federal court jurisdiction by removing a matter to federal court is certainly voluntary insofar as a state is choosing among a set of litigation strategies, including keeping the case in state court.

b. States are also on notice that removing a case has significant legal consequences, even apart from forfeiture of Eleventh Amendment immunity. 28 U.S.C. § 1446(a) provides that:

> A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

28 U.S.C. § 1446(a).[5] Not only does this provision require a high degree of acuity by counsel in drawing up removal papers — calling for "a short and plain statement of the grounds for removal" — it also demands a certification under FRCP 11 that

[5] An earlier version of this provision, 28 U.S.C. § 76 (1940), required that counsel certify that she has examined the proceedings and carefully inquired into all matters set forth in the petition and believes them to be true. This requirement was omitted as unnecessary and inconsistent with FRCP 11, when the statute was amended in 1988 to its current form.

> a pleading, written motion, or other paper . . . to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —
>
> (1) . . . is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . .

Fed. R. Civ. P. 11.

The possibility that an attorney representing a state will remove a case under these provisions, and yet purport to believe that the action has no legal consequences insofar as voluntarily and knowingly accepting the jurisdiction of the federal court, stretches credulity beyond the breaking point. Obviously, to the extent that Georgia's Attorney General is constitutionally and statutorily authorized to handle civil litigation for the state, GA. CONST. Art. 5, § 3, ¶ 4 ("The Attorney General . . . shall represent the state . . . in all civil and criminal cases in any court . . . "); O.C.G.A. § 45-15-3(6) ("It is the duty of the Attorney General . . . to represent the state in all civil actions tried in any court . . . ."), he and his delegated staff must accept the consequences of their litigation conduct. See *Missouri v. Jenkins*, 491 U.S. 274, 279 (1989) (state attorneys not immune from civil contempts or sanctions); *Derechin v. State Univ. of New York*, 963 F.2d 513, 517-18 (2d Cir. 1992) (state attorneys not immune under Eleventh Amendment for FRCP 11 sanctions). Similarly, there is the long-recognized rule that where a principal's attorney (here the Attorney General of Georgia on behalf of the state) enters an appearance in a

proceeding, that constitutes a submission to the jurisdiction of that court. See *French v. Hay*, 89 U.S. (22 Wall.) 238 (1874); *Habic'. v. Folger*, 87 U.S. (20 Wall.) 1 (1873); *Washington, A & G.R. Co. v. Brown*, 84 U.S. (17 Wall.) 445 (1873); *New Jersey v. New York*, 31 U.S. (6 Pet.) 323 (1832).

The combined due diligence and certification requirements of 28 U.S.C. § 1446(a) and FRCP 11, strongly suggest that states are under the necessary notice that removal of a case to federal court is not to be regarded as a casual act. As Justice Kennedy commented in his concurrence in *Schacht*,

> [i]f the States know or have reason to expect that removal will constitute a waiver, then it is easy enough to presume that an attorney authorized to represent the State can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal.

524 U.S. at 397 (Kennedy, J., concurring). The very structure and safeguards of the removal procedure thus ensure that a state's removal notice will be filed voluntarily, and only after the appropriate care has been taken by the state's attorneys to evaluate the state's litigation strategy. The possibility of inadvertent removal of a case by a state is thus farfetched speculation.

2. When a state removes a case to federal court, it constitutes a waiver of the forum immunity the state would otherwise have to the adjudication of the causes of action contained in the plaintiff's complaint. This conclusion comes with significant caveats, which bear on the appropriate balance to be struck in protecting a state's dignity interests in the ensuing federal court litigation. These admonitions are also consistent with the concern that a rule of waiver of Eleventh Amendment immunity, where a "State consents to removal [, should not] put States at some unfair tactical disadvantage."

Schacht, 524 U.S. at 397-98 (Kennedy, J., concurring).

Petitioner is not suggesting that a plaintiff's subsequent amendments to a complaint would be covered by a defendant state's removal action as a waiver, although any counter-claims pled by a state certainly would be. A state thus would not be held to have waived its Eleventh Amendment immunity to causes of action or remedial requests first raised after the removal, absent some additional indication of voluntary consent (assuming that such additional claims or remedies are even subject to the Eleventh Amendment bar). Federal courts obviously would have the power to prohibit such after-added claims. See 28 U.S.C. §§ 1441(c); 1447(a) & (e).

Nor is Petitioner insinuating that states may not, when they remove cases, preserve any common-law or statutory sovereign immunities they otherwise possess. In this case, Georgia is thus free to argue to the federal district court principles of (i) qualified immunity (on behalf of the individual defendants sued in their personal capacity); (ii) the limits of the Georgia Tort Claims Act (GTCA), O.C.G.A. § 50-21-20 *et seq.*, which conditions the state's waiver of immunity in tort cases; and (iii) any residual common law sovereign immunities it might have. Georgia properly preserved these defenses in its answers, see J.A. 23-25; 37, and, in fact, argued these claims before the district court. See Pet. App. 24a-28a.

But what states are waiving by removal is their forum immunity to federal court adjudication of the causes of action and corresponding remedies contained in the complaint. Where, as here, a state removes a case to federal court and then seeks a dispositive ruling on the merits by filing a Rule 12(b)(6) motion, see J.A. 49; Pet. App. 38a, it is beyond cavil that the state voluntarily invokes the jurisdiction of the federal courts, and should not be suffered to later protest that its attorneys lacked

the necessary authority to effectuate such a waiver. In short, although Georgia is free to press its other sovereign immunity defenses before the federal court, it is not at liberty to withdraw its consent to federal jurisdiction in the event a court rejects those defenses.

These caveats are entirely consistent with this Court's ruling in *Schacht* that the presence in a removable case of an Eleventh Amendment-barred claim does not destroy removal jurisdiction that would otherwise exist, and federal courts may proceed to hear the non-barred claims. See 524 U.S. at 392-93. The categorical rule of waiver that Petitioner advances here – that states forfeit the forum immunity granted by the Eleventh Amendment when they remove a case to federal court – would be vastly superior to the *ad hoc* test propounded by the Eleventh Circuit below. See Pet. App. 11a & n.4. That formula vaguely sought to distinguish barred from non-barred claims, even as Georgia originally had sought to dismiss the entirety of the case from federal court on Eleventh Amendment and other sovereign immunity grounds. See J.A. 49; Pet. App. 38a. This Court has thus noted that "a federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 121; see also 28 U.S.C. § 1441(c).

A categorical rule of waiver by removal would vastly simplify the choices that states make in planning their litigation strategies. There would be no risk of bifurcation of claims or remedies, or of accidental invocations of federal court jurisdiction on the mistaken premise that some claims would be subsequently remanded. But even if states insist on a privilege of removing cases to federal court and then seeking dismissals on Eleventh Amendment grounds, it may be legitimately wondered whether such a conditional act is a proper removal within the meaning of sections 1441 and 1446. In short, a state

must be consistent in its litigation strategy: maintain the private parties' undivided action in state court, or unconditionally submit the entire case to federal jurisdiction.

3. Finally, it is worth noting that this Court's decision in this case need not concern itself with other forms of litigation conduct that might give rise to clear waivers of Eleventh Amendment immunity. Removal of an action to federal court manifestly constitutes litigation conduct which has that effect. While a state's filing of proofs of claim in bankruptcy (see 11 U.S.C § 106 (b)) or in admiralty (see FRCP Supp. Rules B & C), raise similar issues of invoking federal court jurisdiction, the additional feature of a state asserting priority to a res, may distinguish such cases. It is instructive that the vast majority of lower court cases involving bankruptcy have found a waiver by a state upon filing a proof of claim, without reference to the authorization of the state officer filing such a claim.[6] In the admiralty context, this Court has ruled that the Eleventh Amendment is not implicated where a state makes a claim to a res not in the state's actual possession. *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 504-08 (1998).

Nor need this Court opine on situations where states merely answer (or answer and counter-claim) in a federal court proceeding, although lower courts are mixed on this point. Compare *Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984), cert. denied, 469 U.S.

[6] See *In re Lazar*, 237 F.3d 967, 976-78 (9th Cir. 2001); *In re Burke*, 146 F.3d 1313, 1318-20 (11th Cir. 1998), cert. denied, 527 U.S. 1043 (1999); *In re Platter*, 140 F.3d 676, 679-80 (7th Cir. 1998); *In re Creative Goldsmiths of Washington, D.C.*, 119 F.3d 1140, 1148-49 (4th Cir. 1997), cert. denied, 523 U.S. 1075 (1998); *In re 995 Fifth Ave. Assocs.*, 963 F.2d 503, 507 (2d Cir.), cert. denied, 506 U.S. 947 (1992); *WJM, Inc. v. Mass. Dep't of Public Welfare*, 840 F.2d 996, 1002-03 & n.8 (1st Cir. 1988).

1191 (1985) (finding waiver), with *Santee Sioux Tribe of Nebraska v. Nebraska*, 121 F.3d 427, 431 (8th Cir. 1997) (no waiver) and *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 n.4 (10th Cir. 1997) (same). A state's mere appearance and answer in a federal proceeding, even if accompanied by counter-claims or set-offs and defenses on the merits, may not rise to the same level of litigation conduct as in the removal context.

Removal constitutes such a clear and affirmative invocation of federal court jurisdiction as to justify a bright-line rule that states, in these circumstances, waive their Eleventh Amendment immunity. Such a rule would have the virtue of clarity and precision, making it possible for states, and their counsel, to effectively plan the litigation strategies they wish to pursue.

D. *Ford Motor*'s Authorization Requirement is Inapplicable in Removal Cases

1. Petitioner acknowledges that the crux of the Eleventh Circuit's ruling below was that under the rule of *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945), a state's waiver of Eleventh Amendment immunity can only be as valid as the authority of the official making it. The Eleventh Circuit concluded that under Georgia's constitution and statutes, the Attorney General of Georgia lacked the requisite authority to waive the state's Eleventh Amendment immunity by petitioning for the removal of a case from state court to federal court. Pet. App. 5a-6a.

Under *Ford Motor*, the test to determine whether a state official is authorized to waive the state's Eleventh Amendment

immunity was interpreted by the Eleventh Circuit to be quite "stringent." Pet. App. 4a. A waiver of Eleventh Amendment immunity by state officials must be explicitly authorized by the state "in its Constitution, statutes and decisions." *Ford Motor*, 323 U.S. at 467. In addition, *Ford Motor* observed that such authority "is not to be presumed in the absence of clear language to the contrary." Id. at 468. The last element in the holding of *Ford Motor* was that the relevant determinations concerning a state officer's authority to waive Eleventh Amendment immunity (at least where the state was an involuntary defendant in federal court) would be made under state, and not federal, law. See id. at 467. If state law is unclear on the authority issue, a federal court may have "resort to the general policy of the state as expressed in its Constitution, statutes and decisions." Id. The *Ford Motor* Court also indicated that "[a]dministrative construction by a state of its statutes of consent has influence in determining our conclusions." Id. at 470 (citing *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 57 (1944)).

Were the rule of *Ford Motor* to be literally and slavishly applied in this case, Petitioner would be obliged to candidly concede that Georgia law appears not to expressly authorize Georgia's Attorney General to waive the state's Eleventh Amendment immunity. But Petitioner submits that *Ford Motor* can be critically distinguished on a number of grounds, not the least of which is that the decision does not deal with situations where the state actually invokes the jurisdiction of the federal courts. *Ford Motor* may be also an unreliable guidepost in the domain of this Court's new Eleventh Amendment jurisprudence. Lastly, the rule of *Ford Motor* — if it is to be applied at all — must necessarily be tempered by such federal law considerations of judicial estoppel and other equitable concerns where a state purports to assert federal jurisdiction and then later recants that choice.

2. Even a cursory review of the procedural posture of *Ford Motor* would reveal that the decision did not implicate a state removing a case to federal court. In fact, the factual scenario presented in *Ford Motor* was a suit brought by a private plaintiff in federal court, with the state merely appearing to defend. See 323 U.S. at 466-67 ("[Indiana's Attorney General] appeared in the federal District Court and the Circuit Court of Appeals and defended the suit on the merits.").

Indeed, in the original contemplation of the Court's decision, the key factor was that the suit in federal court involved the taxing authority of the state. In that connection, the *Ford Motor* Court observed:

> the construction [the Court has] given the Indiana statute leaves open the road to review in this Court on constitutional grounds after the issues have been passed upon by state courts. The advantage of having state courts pass initially upon questions which involve the state's liability for tax refunds is illustrated by the instant case where petitioner sued in a federal court for a refund only to urge on certiorari that the federal court erred in its interpretation of the state law applicable to the questions raised.

Id. at 470. That *Ford Motor* may have been intended to be confined to its unique context of insulating state taxing authority from federal intervention was actually confirmed by this Court in subsequent decisions. See *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946) ("These cases [*Ford* and *Read*] declare the rule that clear declaration of a State's consent to suit against itself in the federal court on fiscal claims is required. The reason underlying the rule . . . is the right of a State to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of

such litigation upon its finances.").

A handful of subsequent decisions of this Court discuss *Ford Motor*'s authorization requirement, but none applies it to situations where a state affirmatively invoked federal court jurisdiction, and none purports to extend the requirement where a state removes a case to federal court. See, e.g., *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam). At most, the rule of *Ford Motor* may have been intended only to prevent unintentional waivers of Eleventh Amendment immunity when a state's lawyers merely appear in federal court to defend a suit.

Where a state acts to invoke federal court jurisdiction, the inquiry under *Ford Motor* may more properly be regarded as whether state law authorizes the state officer to proceed in federal court. In *Schacht*, Justice Kennedy noted in his concurrence that if the issue of the authority of a state official's removal of a case to federal court were to arise, he would not find the holding of *Ford Motor* to be an "insuperable obstacle to adopting a rule of waiver in every case where the State, through its attorneys, consents to removal from the state court to the federal court." 524 U.S. at 397. Justice Kennedy also observed that "a different case may be presented when a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction." Id. at 395. This inquiry of focusing on the authority of the state official to invoke federal jurisdiction is not as stringent as requiring that state law expressly permit the state Attorney General to waive Eleventh Amendment immunity. This approach has been followed in some lower courts. See *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1148 (4th Cir. 1997); *In re Fraser*, 75 F. Supp. 2d. 572, 584 (E.D. Tex. 1999).

For our present purposes, Georgia law manifestly authorizes the state's attorneys to invoke federal jurisdiction.

The Georgia Constitution and statutes expressly authorize Georgia's Attorney General to represent the state in federal court. See GA. CONST. Art. 5, § 3, ¶ 4 ("The Attorney General . . . shall represent the state . . . in *all* civil and criminal cases in *any* court . . . "); O.C.G.A. § 45-15-3(6) ("It is the duty of the Attorney General . . . [t]o represent the state in *all* civil actions tried in *any* court . . . .") (emphasis added).

To the extent that authority is a relevant inquiry at all in waiver by litigation conduct cases, emphasizing the power of state officials to invoke federal jurisdiction would appear to be the best way to avoid the moral hazard of having state Attorneys General sign removal petitions (under pain of Rule 11 sanctions) and then later disclaim their capacity. This Court has been properly chary of state claims in this regard. In *Gunter v. Atlantic Coast L. R. Co.*, 200 U.S. 273 (1906), the Court turned aside South Carolina's assertion that its officers were disabled from participating in earlier federal litigation. The Court concluded that a South Carolina statute authorized such action. See 200 U.S. at 285-86.

Even more pertinently, this Court in *Gardner v. New Jersey*, 329 U.S. 565 (1947), held that New Jersey's State Comptroller was authorized to file a proof of claim, and the state's Attorney General was empowered to "resist[] the objections made to the claim, and is authorized to 'Attend generally to all matters in which the state is a party or in which its rights and interests are involved'." Id. at 574-75 (quoting N.J.R.S. § 52:17-2g (1937)). Needless to say, the New Jersey statute relied upon by the Court in *Gardner* to confirm the Attorney General's authority is nearly identical in substance to Georgia's statute at issue here. See O.C.G.A. § 45-15-3(6) ("It is the duty of the Attorney General . . . [t]o represent the state in all civil actions tried in any court . . . .")

3. There may be even greater cause for concern in extending *Ford Motor*'s authorization requirement to the removal context. The decision may properly be regarded as an artifact of a bygone period in this Court's Eleventh Amendment jurisprudence. With the demise of virtually all forms of constructive waivers in *College Savings Bank*, 527 U.S. at 680, and particularly of *Parden* waiver, the need for ascertaining the authority of state officials to engage in market participation, or the acceptance of federal conditionalities, or other tenuous activities tending towards a finding of waiver, is less significant. It is certainly less relevant in the context of waivers via affirmative litigation conduct in particular cases. To the extent that *Parden* appeared to rely on *Ford Motor*'s authorization requirement, see 377 U.S. at 194-95, it is highly suggestive that *Ford Motor*'s rule was intended to be applied in situations only of constructive waiver, and not where a state affirmatively invokes federal court jurisdiction.

In a similar fashion, *Ford Motor*'s emphasis on the application of state law (the authority of state officials) to what would otherwise be a matter of federal concern (the invocation of immunity in federal court), may be explained by the peculiar posture of that case. Because Indiana was an involuntary defendant in the federal proceeding, the essential ingredient of consent was absent, irrespective of the authority of Indiana's Attorney General under state law. The reference to state law authority was thus not essential to the result in *Ford Motor*. This observation suggests that there may be an appropriate, and limited, role for federal law in conditioning and modifying the formalities of state law rules regarding official authority. See *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997) ("Ultimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore 'one of the

United States' within the meaning of the Eleventh Amendment, is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character."). This is particularly so where the state's attorneys engage in certain forms of litigation conduct with Eleventh Amendment-waiving consequences.

For example, *Ford Motor* does not preclude the application of judicial estoppel principles, see *New Hampshire v. Maine*, 121 S.Ct. 1808, 1814-18 (2001), where a state seeks federal court jurisdiction (through removal) only to disavow the legal consequences of that choice when it decides that it is not pleased with the outcome. And while Petitioner is mindful that "'ordinarily the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states'," id. at 1817 (quoting *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 369 (1946)), the rule is relaxed where a state is in the position of an ordinary litigant. See 329 U.S. at 369 ("in the present litigation Illinois is in the position of any lien creditor."). Where a state, through a removal petition, compels a party to proceed with litigation in federal court, and then later seeks to unwork that invocation, it might be said that the state has placed itself on an equal footing with private litigants. See also *Murray v. Silberstein*, 882 F.2d 61, 66-67 (3d Cir. 1989) (principles of judicial estoppel prevent a plaintiff in suit against a state to alternatively raise and disclaim the significance of the Eleventh Amendment bar).

4. That leaves the fairness of permitting states to remove cases to federal court, to demand dispositive rulings, and to *then* seek dismissals based on Eleventh Amendment immunity by virtue of the purported lack of authority of the state official making the initial removal. See *Newfield House, Inc. v. Mass. Dep't of Public Welfare*, 651 F.2d 32, 36 n.3 (1st Cir.) ("[Massachusetts'] attempt now to invoke the Eleventh

Amendment would if allowed work a virtual fraud on the federal court and opposing litigants."), cert. denied, 454 U.S. 1114 (1981); *Sutton v. Utah State Sch. for the Death & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) ("The Attorney General's Office having caused the removal to federal court here, and having litigated throughout on the merits here, we feel it would be . . . grossly inequitable to allow assertion of the Eleventh Amendment bar. . . ."). These sentiments were certainly mooted in Justice Kennedy's concurrence in *Schacht*, where he observed that

> [i]n permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.

524 U.S. at 394 (Kennedy, J., concurring).

The true mischief presented by Georgia's litigation strategy in this case was the direct denial of Lapides' right to proceed (under both state law and federal grounds) against the state in its own courts. Under the Georgia Tort Claims Act, the state has permitted plaintiffs a state-court forum for the assertion of certain tort claims directly against the state. At least as to those tort claims, allowing the state to remove and employ the Eleventh Amendment to defeat the claims would be the same sort of "bait and switch" tactic that this Court condemned in *Reich v. Collins*, 513 U.S. 106, 111 (1994) ("But what a State may not do, and what Georgia did here, is to reconfigure its [state law remedial] scheme, unfairly, in midcourse – to 'bait and switch,' as some have described it."); see also *Alden v. Maine*, 527 U.S. 706, 740 (1999). The remove-and-claim-

immunity gambit also deprives plaintiffs of the state court forum that state law provides for section 1983 and due process claims, since state rules of civil procedure and preclusion would normally require such claims to be asserted in the same action as tort claims. Georgia's litigation strategy thus purports to block any avenue of relief open to plaintiffs.

This case thus presents the Court with the opportunity to eliminate one, albeit limited and potential, abuse by states in the exercise of their Eleventh Amendment immunity. Ever mindful of the strong federalism concerns that undergird the state's forum immunity in federal courts, this Court should nonetheless decline to extend Eleventh Amendment doctrine in such a way as to sanction such strategic behavior on the part of states. Given the extensive procedural safeguards attendant with a state's removal of a case to federal court, it is manifest that states voluntarily and knowingly invoke federal court jurisdiction. The precise authorization of the state's attorneys to forfeit Eleventh Amendment immunity should be irrelevant where it is clear that such counsel have the power to invoke federal jurisdiction.[7] And since the state is not foregoing any

[7] In the event this Court should decide that a state Attorney General's authority to waive Eleventh Amendment immunity remains decisive, Petitioner would submit that the proper course would be to require that where states have failed to grant that authorization they may not seek to invoke the federal court's jurisdiction. In other words, states may not, by reserving the Eleventh Amendment bar, only conditionally and partially accept federal court jurisdiction, whether by removal or other means. For those states such as Georgia – which has apparently refused to allow its attorneys the power to waive Eleventh Amendment immunity, see Pet. App. 5a-6a (discussing GA. CONST. Art. 1, § 2, ¶ 9 (e) - (f), and state court cases) – attempts to invoke federal court jurisdiction should be regarded as a nullity. If a state's attorneys thus seek to remove a case and fail to provide the federal court with definitive proof of their capacity to waive the Eleventh

(continued...)

other immunities or defenses it otherwise legitimately possesses, no genuine dignity interest of the states is sacrificed.

But what is most certainly vindicated by the rule propounded here — that a state's removal of a case to federal court forfeits its Eleventh Amendment immunity — is that states will be expected to abide by the decisions of the tribunals they have selected. In such circumstances, as Justice Kennedy noted in *Schacht*, "[t]his is the situation in which law usually says a party must accept the consequences of its own acts." Id. at 393.

[7](...continued)
Amendment bar, the proper course for the district court would be to remand the entire case back to state court.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed and the case should be remanded for further proceedings.

Respectfully submitted,

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